

NO. 03-217  
IN THE SUPREME COURT OF THE STATE OF MONTANA

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OLYMPIC COAST INVESTMENT, INC., a Washington Corp.,

Plaintiff and Respondent,

vs.

LARRY D. WRIGHT, a/k/a/ L.D. WRIGHT, a/k/a LAWRENCE  
D. WRIGHT and ANN MARIE WRIGHT, a/k/a ANN M. WRIGHT,

Defendants and Appellants.

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**APPELLANTS' REPLY BRIEF**

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On Appeal from the District Court of the Seventeenth  
Judicial District of the State of Montana, In and  
For the County of Valley  
Civil No. DV-1999-27  
Hon. Judge John C. McKeon Presiding

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Filed \_\_\_\_\_, 2003  
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## **ARGUMENT**

Olympic states that “Wrights’ have appealed the District Court’s refusal to allow them to amend their pleadings to add: (a) an affirmative defense under the one-action rule; and (b) a counterclaim seeking a money judgment for alleged usury.” Respondent’s Answer Brief page 6. However, as the Court can see from Appellants’ Opening Brief, Appellants have not argued the one-action rule, but have focused on the counterclaims/defense of usury. Olympic claims that this counterclaim would have been futile as a matter of law and therefore, adding the affirmative defense was impermissible. Olympic based this assertion on the BAP’s opinion which, regardless of the BAP’s statement to the contrary is moot.

What Olympic fails to inform the Court is that Wrights objected to the Proof of Claim of Olympic and, out of that objection, the adversary was then filed. The objection had the same reason as was in the defenses and counterclaims in the adversary, namely usury. There is no question that an objection to a Proof of Claim is directly related to the bankruptcy and directly involved the Debtors’ reorganization. Thus, the dismissal of the bankruptcy mooted the adversary proceeding, notwithstanding the statements made by the BAP. While this counsel did not conduct the appeal to the BAP, nor argue the case to the BAP, it is clearly evident that the

amount of the Proof of Claim of Olympic was instrumental to the Wrights' reorganization. Olympic can call the action what it will, but there is no question that the action was to determine the Proof of Claim and the amount to be reorganized in the Wrights' bankruptcy.

Therefore, cases cited by Olympic actually support Wrights' position as will be shown further in the discussion of *Traders State Bank of Poplar v. Mann*, (1993) 852 P.2d 604, 258 Mont. 326, below.

Next, Olympic states that "it should be noted that the Wrights do not dispute the four *Slater* elements of *res judicata* are met by the judgment entered by the bankruptcy court." Appellee Brief, page 17. That is inaccurate. On page 12 and 13 of Appellants' Brief, Appellants discuss the fact that, like in the *Mann* case, there is the question whether the issues were the same. The Court in *Mann* had stated that the Defendants were unable to raise certain defenses to the notes in their earlier lawsuit due to the actions of the bankruptcy. The *Mann* case was later dismissed and the reorganization plan was not implemented. As in *Mann*, the Wrights' case was dismissed and the reorganization plan was also not implemented. The Wrights were also not afforded the full opportunity to reach final judgment

as their appeal became moot. In fact, in the *Mann* case, an appeal was taken all the way to the Ninth Circuit. Those debtors were still allowed the opportunity to bring back those defenses that could have been raised earlier. Once the *Mann* case had been dismissed, the Manns were then able to go back and relitigate those issues. The same is in the Wright case. Once Wrights were no longer able to continue with their plan due to the lifting of the automatic stay and the sale of the income property, there was no reason to pursue their Chapter 11 reorganization and it was dismissed. The decisions by the Bankruptcy Court and, subsequently, the BAP, then became moot.

It is noted that on page 28 of Appellee's Brief, Olympic hints that somehow the *Mann* case was overturned by *Turner*, 276 Mont. 55 (1996). However, a simple reading of this case indicates that none of the pertinent issues in *Mann* were overturned by *Turner*. This is simply a smoke screen on behalf of Olympic.

Also, on page 30 of Appellee's Brief, Olympic reiterates that in *Mann*, the debtor "could not" challenge the validity of the notes and security interests. While this is a quote from *Mann*, it is taken out of context by

Olympic. In fact, *Mann* could have contested the validity of the notes in the bankruptcy, but chose not to due to an agreement that was approved by the Bankruptcy Court. It was only after the bankruptcy failed that they then were able to go back and utilize those earlier defenses. While, certainly, Wrights attempted to utilize their defenses and offsets of usury in the bankruptcy case, again, once the bankruptcy itself was rendered moot the Wrights should have been able to continue to utilize those defenses in State Court. There is simply very little difference between the *Mann* case and the Wrights' case.

Further analogies between the Wright and the *Mann* case can be made and summed up. In *Mann*, the debtors filed a bankruptcy and agreed to withhold their defenses against the bank's notes. This was approved and a confirmed plan was enacted. An appeal was had by the bank and the bankruptcy continued. For reasons not clear in the decision, years later, the bankruptcy was dismissed, while most likely due to inability of the debtors to continue to pay under their plan. At the time that the plan was finalized, that plan then became the new contract between the debtors and the bank.

After the bankruptcy was dismissed, however, the Manns were able to utilize those defenses that had been withheld.

In the Wright case, a bankruptcy was filed and the plan was submitted. An objection to the Proof of Claim of Olympic was filed and Olympic then filed an adversary proceeding to obtain a declaratory judgment on the amount of the debtors' obligation to them for purposes of the plan. The Wrights utilized the defense of usury and were not successful at trial. During the appeal, the Wrights were unable to obtain a stay and certain income properties were sold destroying any ability of the Wrights to put together a feasible plan. At that point, the bankruptcy was moot as was the appeal on the decision because had even the BAP ruled in Wrights' favor, there was no remedy that could have been given the Wrights as their property secured by the usurious notes had been sold. Therefore, Wrights only had the option to utilize the usury defense in State District Court against the remaining claims of Olympic. Try as they might, Olympic simply cannot show a substantial difference between the *Mann* and the Wright cases.



The Wrights' defense of usury was not barred by *res judicata*. Due to the sale of the income property and the mootness of bankruptcy arising therefrom, the BAP appeal was also rendered moot. It is respectfully requested that the Court reverse the District Court's decision that *res judicata* barred the Wrights from pursuing their usury defense.

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of October, 2003.

DESCHENES & SULLIVAN

BY: \_\_\_\_\_  
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Appellants

## CERTIFICATE OF MAILING

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mail at Great Falls, Montana, enclosed in a sealed envelope with first class postage and prepaid thereon and addressed as follows:

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DATED this \_\_\_\_\_ day of October, 2003.

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